

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

Master File No. 2:13-CV-20000-RDP

**IN RE: BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
(MDL. No. 2406)**

**PROVIDER PLAINTIFFS' MOTION FOR PARTIAL SUMMARY
JUDGMENT AGAINST CERTAIN DEFENDANTS THAT WERE NOT
SIGNATORIES TO SETTLEMENT AGREEMENTS IN *LOVE v. BLUE
CROSS AND BLUE SHIELD ASSOCIATION***

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Provider Plaintiffs respectfully move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for partial summary judgment against Defendants Blue Cross Blue Shield of Arizona, Inc., USABLE Mutual Insurance Company, d/b/a Arkansas Blue Cross and Blue Shield, California Physicians' Service, Inc. d/b/a Blue Shield of California, Highmark BCBS Inc. d/b/a Highmark Blue Cross Blue Shield of Delaware, Blue Cross of Idaho Health Service, Inc., Blue Cross and Blue Shield of Kansas, Inc., Blue Cross Blue Shield of Kansas City, Inc., Blue Cross Blue Shield of Nebraska, HealthNow New York, Inc. d/b/a BlueCross BlueShield of Western New York and BlueShield of Northeastern New York, Noridian Mutual Insurance Co. d/b/a Blue Cross Blue Shield of North Dakota, Blue Cross and Blue Shield of Vermont, Blue Cross Blue Shield of Wyoming, and Excellus Health Plan, Inc. d/b/a Excellus BlueCross BlueShield (the "Non-Released Defendants"). Plaintiffs seek summary judgment barring the Non-Released Defendants, who were not signatories to the settlement agreements entered into by certain Blue Cross Blue Shield entities and providers in *Love v. Blue Cross & Blue Shield Ass'n*, No. 1:03-cv-21296-FAM (S.D. Fla.), from asserting any defenses related to the *Love* settlement agreements, including res judicata, collateral estoppel, release and waiver.

The Non-Released Defendants chose not to settle the provider plaintiffs' claims against them in *Love* but now belatedly assert their entitlement to the

preclusive effect of the settlement agreement between providers and other Defendants. The facts are not disputed and the law is clear. The Non-Released Defendants' after-the-fact attempt to piggyback on other Defendants' settlement agreements is both baseless and futile. Plaintiffs' motion for partial summary judgment should be granted.

BACKGROUND

In April 2000, the Judicial Panel on Multidistrict Litigation created *In re Managed Care Litigation*, Case No. 1:00-mdl-1334, and transferred all related actions to the United States District Court for the Southern District of Florida. The provider plaintiffs in that litigation alleged that several managed care companies had engaged in a scheme to systematically deny, delay, and diminish payments to healthcare providers. In May 2003, providers filed an action in the Southern District of Florida against numerous Blues entities, alleging they had engaged in a similar scheme in order to undercompensate healthcare providers. This action, *Love v. Blue Cross & Blue Shield Ass'n*, No. 1:03-cv-21296-FAM ("*Love*"), was consolidated into the *In re Managed Care Litigation*.

UNDISPUTED FACTS

1. Between 2005 and 2007, certain Blues defendants in *Love* entered into settlement agreements with the provider plaintiffs. Declaration of Joe R. Whatley, Jr. (Ex. A) ¶ 2.

2. The Non-Released Defendants were not signatories to any of these settlements or any other settlement that is relevant in this litigation. Ex. A ¶ 3.

3. The Provider Plaintiffs addressed the *Love* settlements in Paragraphs 42 and 43 of their Fourth Amended Complaint:

42. Certain of the named Provider Plaintiffs in this action, Charles H. Clark III, M.D., Robert W. Nesbitt, M.D., and Luis R. Pernia, M.D. (“the Alabama *Love* Providers”), all medical doctors, were members of the Settlement classes in class settlements with some of the Defendants consummated in the Southern District of Florida before Judge Moreno. For purposes of this Complaint, those Providers who were members of the Settlement Classes listed above do not bring claims against any of the released parties in those Settlements....[Plaintiffs] continue to pursue their Sherman Act claims against the “Non-Released Blues” (listed below) who were not Releasing Parties in the Southern District of Florida and for whom there is no argument that any class-wide claims were previously released or are subject to any injunction in the Southern District of Florida.

43. The list of Non-Released Blues (described above) includes: Blue Cross Blue Shield of Arizona, Arkansas Blue Cross and Blue Shield, Blue Shield of California, Highmark Blue Cross Blue Shield Delaware, Blue Cross of Idaho, Blue Cross and Blue Shield of Kansas, Blue Cross Blue Shield of Kansas City, Blue Cross Blue Shield of Nebraska, HealthNow, Noridian Mutual Insurance Co. d/b/a Blue Cross Blue Shield of North Dakota, Blue Cross and Blue Shield of Vermont, Blue Cross Blue Shield of Wyoming, and Premier Health, Inc. Additionally, while Excellus entered a settlement in New York state court, it did not obtain a release for any doctors other than those in New York, and that release does not affect the claims made in this amended complaint. Excellus is therefore also treated as a Non-Released Blue for purposes of this Complaint.

Consolidated Fourth Amended Provider Complaint ¶¶ 42–43.

4. Despite the fact that none of the Non-Released Defendants are signatories to any of the settlement agreements, each and every Non-Released Defendant takes the position that Providers Plaintiffs' claims are barred by the doctrine of res judicata or collateral estoppel and have been released or waived. Excerpts from Non-Released Defendants' Answers (Ex. B).

5. In their answers to Paragraph 43, Defendants Blue Cross of Arizona, Blue Cross of Idaho, Blue Cross and Blue Shield of Kansas, Blue Cross Blue Shield of Kansas City, Blue Cross Blue Shield of Nebraska, HealthNow, Noridian Mutual Insurance Co. d/b/a Blue Cross Blue Shield of North Dakota, and Blue Cross Blue Shield of Wyoming admit that they "did not enter into a settlement agreement in the *Love* case in the Southern District of Florida" but nonetheless "state[] that all claims [against them] in the *Love* case were dismissed by that court." Ex. B.

6. The Court did dismiss these Non-Released Defendants from the *Love* case, entering final judgment in May 2009. Final Judgments (Ex. C).

7. However, these Defendants were not dismissed as a result of any of the *Love* settlement agreements. To the contrary, the Court in its order dismissing the provider plaintiffs' claims against the Non-Released Defendants for failure to state a claim specifically noted the Non-Released Defendants remained in the case because their claims had not been settled:

The Court finds itself faced with a seventh version of the Plaintiffs' original complaint, following a Settlement Agreement among many of the original parties. ***In fact, only non-signatories of the Settlement Agreement remain as Defendants in this case.***

Order Adopting Magistrate Judge's Report and Recommendation and Dismissing Case (Ex. D) at 1 (emphasis added).

8. None of these Defendants ever moved to dismiss the claims against them in *Love* on the basis that their claims had been released in any of the settlement agreements. Ex. A ¶ 4.

LEGAL STANDARD

Summary judgment is proper “[w]hen the only question a court must decide is a question of law,” *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011), and “where there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law.” *Lofton v. Secretary of Dep’t of Children & Family Servs.*, 358 F.3d 804, 809 (11th Cir. 2004) (quoting Fed. R. Civ. Pro. 56(c)) (internal quotation marks omitted).

ARGUMENT

The Non-Released Defendants were not signatories to any of the settlement agreements in *Love*. This fact is undisputed. For the first time – in the answers and affirmative defenses they filed in this litigation – the Non-Released Defendants suggest the Provider Plaintiffs’ claims against them are precluded by other Defendants’ settlement agreements.

Eleventh Circuit law is clear that non-signatories are generally not entitled to enforce a settlement agreement:

A rule of contract law is that one who is not a party to an agreement cannot enforce its terms against one who is a party. See *Walsh v. Columbus, H.V. & A.R. Co.*, 176 U.S. 469, 479, 20 S.Ct. 393, 397, 44 L.Ed. 548 (1900); *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1169 (11th Cir.2009); *United States v. Puentes*, 50 F.3d 1567, 1574 (11th Cir.1995); 13 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 37:1 (4th ed. 1999) (“As a general rule, strangers to a contract acquire no rights under such a contract.” (quotation marks omitted)). The right of enforcement generally belongs to those who have purchased it by agreeing to be bound by the terms of the contract themselves.

Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1167–68 (11th Cir. 2011). Florida law is in accord:

[T]he Fund, as a nonparty to the settlement agreement, has no standing to enforce it. A person not a party to nor in privity with a contract has no right to enforce it.

Gallagher v. Dupont, 918 So. 2d 342, 347 (Fla. 5th Dist. App. 2005).

The Non-Released Defendants have identified no reason to deviate from these general principles of contract law with regard to the *Love* settlements and have not identified any other relevant settlement agreement. Because none of the Non-Released Defendants were parties to the *Love* settlement agreements, none are entitled to claim release, waiver, res judicata, or collateral estoppel with regard to those settlements. Accordingly, Provider Plaintiffs are entitled to partial summary judgment.

CONCLUSION

For the aforementioned reasons, Provider Plaintiffs respectfully move the Court for an Order granting Provider Plaintiffs partial summary judgment and barring the Non-Released Defendants from relying on any defenses of release, waiver, res judicata, or collateral estoppel with regard to any previous settlement agreements.

Dated: April 25, 2018

Respectfully submitted,

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I certify that on April 25, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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